

War, Terrorism and Torture

I. The Relevance of Moral Considerations to War

According to a view often called *realpolitik*, self-interest (narrowly construed) is the only good or *rational grounds* for determining foreign policy. As a consequence, a nation is justified in attacking or invading another so long as doing so will provide long-term benefit to that nation's health, wealth and standing. As Wasserstrom points out, this *prescriptive* claim is different from the purely *descriptive* claim that nations often or always do decide whether or not to go to war on wholly self-interested grounds. (Maybe states never do what they ought to do.)

Wasserstrom's thesis: Nations—and the individuals voting for, legislating, or executing national policy—should be guided, at least in part, by *moral* considerations when deciding upon their foreign policies, and, in particular, when deciding: (a) whether or not to wage war, and (b) how to conduct themselves when waging war.

In opposition to this thesis Wasserstrom considers the view that the American government's decision under Truman to drop nuclear weapons on Hiroshima and Nagasaki was justified so long as this meant that *fewer Americans* would die in what remained of WWII even if many *more people overall* died in the nuclear attack than would have died had America continued to fight the war by more conventional means (or accepted the conditional surrender that the Japanese were prepared to give—they wanted to keep their emperor).

(*Bad*) *Argument 1*: American lives are more valuable than Japanese lives.

(*Better*) *Argument 2*: Leaders have special obligations to their citizens that warrant or even require them to value the lives of their citizens higher than the lives of foreigners.

Wasserstrom's reply to Argument 2: Special obligations and duties do not always outweigh general or universal obligations and duties. E.g., a lawyer has a special obligation to look after the interest of her clients, but she cannot justly bury evidence to secure a favorable verdict.

Question: How ought those public officials who directly influence foreign policy and its execution weigh the interests of Americans against the interests of those foreigners affected by U.S. policy?

II. Just War Theory: The attempt to elucidate general principles stating: (a) when, if ever, one nation or people is morally justified in going to war against another, and (b) what conduct, if any, is morally acceptable in the waging of war.

Jus ad Bellum: Those conditions under which one nation or people is morally justified in going to war against another.

Jus in Bello: The kind of conduct that is morally acceptable in the waging of war.

III. JUS AD BELLUM—Timmons lists five conditions that he thinks are necessary to achieve jus ad bellum:

Condition 1: Only a person or body with legitimate authority over the foreign policy of a nation, state, or people can rightfully put it into war against another.

Questions: What makes someone's authority legitimate? Must she have the will of the majority of her people behind her? Can someone instead exercise legitimate authority in declaring war against the wishes of the majority of her people so long as she has the political power (e.g. constitutional right) to do so, and she acquired this power via legitimate (e.g. democratic) means? Are the only people with the right sort of authority leaders of states recognized as such by international law (i.e. the UN)? Or might the leaders of an unrecognized body (e.g. the Kurds) have the authority needed to declare war so long as in doing so they express the will of their people?

Condition 2: A nation must have a just cause or good reason for going to war to do so justly.

Questions: If there are any good reasons for going to war, self-defense is one of them. Is it the only one? Can a nation legitimately wage a war to *preempt* or prevent an attack?

Let's suppose that preemption can be a just cause of war (though this is very controversial). What happens if one nation attacks a second nation because the first *incorrectly* thinks the second is going to attack? Is the attack unjust in this case? And (whether or not it is unjust), what are the attacking nation's moral responsibilities once the mistake is discovered?

Subjective Justification: A nation is subjectively justified in waging war just in case it has (or is justified in believing that it has) good evidence of a good reason to go to war.

Objective Justification: A nation is objectively justified in waging war just in case it actually has a good reason to go to war.

One might think of our initiation of the current Iraq war as subjectively justified but not objectively justified. The war wasn't *objectively* justified if the only good reason to go to war would have been preemption of a strike aimed at the U.S. or its allies in the region, and, as we now know, Iraq did not have the weapons to conduct such a strike. But the war might still have been subjectively justified if the United States government really did have on-balance good (if misleading) evidence that Saddam had these weapons of mass destruction and was planning to use them in the immediate future. (This is still a matter of debate.) Still, even if—contrary to fact—Saddam had amassed chemical and biological weapons, it is doubtful he could have used them to effectively attack the United States, so we would have to ask whether the war might have been justified as an effort to preempt an attack on a US ally or US citizens abroad.

A *pro tanto* moral reason to x is a reason to x that can be overridden but not eliminated.

A *prima facie* reason to x is a reason to x that can be both overridden and eliminated.

The fact that you promised Bob to pick him up at school at 4:00PM gives you a *pro tanto* reason to pick him up at school at that time. The fact that a stranger on the side of the road needs your help gives you a good reason to delay and therein fail to keep your promise to Bob. But though the need of the stranger *overrides* your promise to Bob, it does not *eliminate* the moral force of that promise. This explains why you owe Bob an apology for being late, even though you did what was the morally right thing to do overall in helping the stranger. The promise to Bob provides you with a *pro tanto* reason to show up on time—it can be overridden but not eliminated.

In contrast, the fact that John is being beaten upside the head with Mary's purse gives you a prima facie reason to come to his aid. But if you learn that John was trying to steal the purse, you no longer have any good reason to aid John. The fact that John is being subjected to a modicum of pain was only a prima facie reason to intervene. The fact that it constitutes a just response to his attempted robbery both overrides and eliminates your reason to intervene.

Suppose, again, that preemption can provide an on-balance reason to intervene. Do the rights and concerns of the innocent civilians affected by a preemptive war provide pro tanto or merely prima facie reasons to refrain from harming them? If the reasons are pro tanto, what, if anything, does an invading nation owe the innocent victims of a justly initiated preemptive war?

Further Consideration Regarding Condition 2:

Do humanitarian grounds ever supply a good enough reason to warrant waging war? Under what conditions do they justify intervention? Can one nation legitimately attack another to stop genocide, slavery, or even less severe abuses of civil rights?

Saddam wasn't planning to attack the United States. He had no real connections to al Qaeda (where almost everyone agrees that al Qaeda was the group that attacked the United States on 9/11). He had no weapons of mass destruction, and he was a long way from developing the kinds of weapons that could be used against the United States (e.g. nuclear weapons and the long-range missile systems necessary to get them over here). Nevertheless, Saddam was a brutal tyrant. Our best evidence suggests that (during the Iran/Iraq war and perhaps afterward) he gassed the Kurdish population of Iraq. He jailed and executed his political opponents, and he never allowed his citizens to hold free elections, establish a free press, and enjoy the kinds of religious and economic liberties we enjoy in the United States.

Questions: Did that fact that Saddam was an evil dictator justify the US in invading Iraq? Are offensive wars justified when they are aimed at riding other nations from tyranny? Is a war fought to instill democracy always a just war?

The preeminent just war theorist Michael Walzer says, "No." (And he said this is work that long predates the invasion of Iraq.) Walzer's primary claim is as follows:

*Foreign nations often do **not** have the moral right to invade a nation even when that nation's government is **illegitimate** and the citizens of that state: (1) have the right to overthrow that government, and (2) do not have an obligation to fight on its behalf.*

Nevertheless, Walzer sets out several rules of disregard that explain when humanitarian reasons can provide just cause for war:

1. "Struggles for secession or national liberation justify or may justify intervention because in such cases there is no fit at all between government and community, and the state cannot claim, once the rebellion has reached certain proportions, even a presumptive legitimacy."
2. "When a single community is disrupted by civil war, and when one foreign power intervenes in support of this or that party, other powers can rightfully intervene in support of the other party. Counter-interventions of this sort can be defended without reference to the moral character of the parties."

3. "Interventions can be justified whenever a government is engaged in the massacre or enslavement of its own citizens or subjects."

Questions: What is the guiding principle behind these exceptions to the prohibition against offensive wars fought against tyranny? Are there exceptions to the prohibition that Walzer has left out? Do the rules of disregard that Walzer lists in fact allow wars that would not really be justified?

Condition 3: If it is to go to war justly, a nation must have already exhausted all reasonable non-violent options for achieving its just aims.

Condition 4: To be justified in going to war a nation must have a reasonable prospect of achieving its just aims by fighting the war.

Condition 5: To justly go to war the beneficial consequences achievable by fighting the war must outweigh (or be substantially greater than) whatever harm and damage it is reasonable to believe will result from the war.

Question: Did the United States government meet conditions 3-5 when declaring war against Iraq?

IV. JUS IN BELLO is considerably more complicated (though we have only scratched the surface of jus ad bellum, which is itself complicated enough). An adequate theory of jus in bello must craft rules or principles to help soldiers deal with the many different morally challenging situations they will face. Of particular interest to us in what follows are: (a) questions about the moral permissibility of **torture** in fighting war; and (b) the **doctrine of double effect**, which sets conditions on the treatment of "innocent" people or non-combatants in the prosecution of war. In particular, we will examine the relation of the doctrine of double effect to questions about the nature and impermissibility of (c) **terrorism**.

V. Defining 'Terrorism' in a "Neutral" Way

Consider murder, which is arguably *analytically* unjust or bad. That is, the word 'murder' just means (prima facie) *unjust killing*. So when we argue for the moral permissibility of killing in self-defense, we do not say that murder is sometimes permissible; instead we say that not all killing is murder. In particular, when someone kills her attacker because this is the only way she can defend herself from his attack, she hasn't murdered anyone. On the other hand, someone might argue that though murdering someone is (as a matter of what 'murder' means) always "prima facie" unjustified, it can still be morally permissible "all-things-considered." Perhaps, for instance, murder is permissible all-things-considered when it is necessary to save a large number of innocent people. For instance, you might think it is morally permissible to assassinate an evil dictator if this means saving the lives of thousands of innocent people, but that assassination is nevertheless always a form of murder.

Questions: Is 'terrorism' like 'murder' in being analytically linked to (prima facie) wrongness? Does the very meaning of 'terrorism' insure that in calling an act 'terrorism' we describe it as (prima facie) morally bad? When he says that we must find a "neutral" definition of terrorism, Khatchadourian is denying that 'terrorism' is like 'murder' and Timmons joins Khatchadourian in calling for a definition of 'terrorism' that doesn't assume its impermissibility. But is this right?

Sterba's definition of terrorism (slightly modified): Terrorism is the use or threat of violence intentionally aimed against innocent people to elicit terror in them, or in some other group of people, in order to further a political objective.

(1) Notice that this definition allows that **states** can commit acts of terrorism, not just what are arguably terrorist organizations or terrorist political parties (e.g. al Qaeda, Hamas, the IRA, Hezbollah). This is probably a good thing if, contrary to Timmons and Khatchadourian, calling an act 'terrorism' is always labeling it as something bad. (because of the very meaning of 'terrorism'.) There are two reasons for this:

(a) It is hard to see why having statehood as defined by, say UN recognition, should be morally significant in and of itself. What if a group *should* be recognized as the government of a nation, but is unjustly kept from that status because of unjust (politically motivated) votes by the UN? Do we want to say that the group's efforts to defend itself are really acts of terrorism until it achieves the official political status that it should already have?

(b) A non-governmental organization responsible for intentional attacks on innocents in pursuit of a political objective can become the government of a nation. One example of this might be the election of Hamas as the majority party in the Palestinian legislature. Do we want to say that the actions of such a group before their election (or their achievement of political power through non-democratic means) were acts of terrorism, but the very same sorts of actions (e.g. suicide bombings on crowded Israeli buses) are not acts of terrorism if executed after they have gained power? This seems wrong.

(2) What is it for someone to be innocent? Are only the soldiers actually fighting a war non-innocent, or are all soldiers non-innocent? (Consider, in this light, the inflammatory claim that since Israel has a mandatory draft, all of its citizens are potential, actual or former soldiers and that, in consequence, none of them is truly innocent and so none of them can be the target of an act of terrorism.) What about those people working in factories to supply munitions? What about non-governmental contractors helping a war effort (e.g. Blackwater employees on the ground in Iraq)? Were the employees in the Pentagon innocent even though they worked for the department of defense? If not, does that mean the 9/11 attack on the WTC was an act of terrorism, but the attack on the Pentagon was not? (Of course, we can't forget the innocent people on that plane, but if Al Qaeda had sent a missile into the Pentagon, would that have been an act of terrorism?) Is the planting of roadside bombs to kill American soldiers in Iraq not terrorism?

Consider what Henry Shue says in his article, "There are some conceptual difficulties in trying to separate combatants and non-combatants in some guerrilla warfare and even sometimes in modern conventional warfare among industrial societies. This difficulty is a double-edged sword; it can be used to argue that it is increasingly impossible for war to be fought justly as readily as it can be used to argue that the distinction between combatants and noncombatants is obsolete" (p. 425).

Shue's reflections might be used to argue for Sterba's thesis that almost none of the wars that have been fought in recent history can be considered just because almost all of them violate the principles of just war theory. Sterba calls this thesis *just war pacifism*.

When it is hard to get a grasp on the meaning of a word like 'terrorism' the best thing to do is to consider examples. Your initial rough definition should classify as terrorism all those examples that are clear cases of it. Once this is in place you can look at more difficult cases and refine the

definition so that it fits them. With this in mind, let's consider some fairly obvious cases along with the controversial examples Sterba discusses on p. 415 of his article:

- (a) The 9/11 attack on the WTC.
- (b) The 9/11 attack on the Pentagon.
- (c) The shooting down of Pan Am Flight 103 over Lockerbie, Scotland in 1988.
- (d) The bombing of the U.S. embassies in Kenya and Tanzania in 1998.
- (e) The U.S. bombing of the pharmaceutical plant in Sudan in 1998.
- (f) The string of suicide bombings within Israel conducted by Palestinians.
- (g) Israeli assassination of active members of Hamas and the PLO.
- (h) U.S. sponsored sanctions in Iraq in the years before the invasion.
- (i) Israel's occupation of the West Bank and Gaza.
- (j) The actions of the contras in Nicaragua and U.S. support for them.
- (k) The U.S.'s nuclear bombing of Hiroshima and Nagasaki.
- (l) The threat of nuclear attack against the Soviets throughout the Cold War as a means to deter Soviet aggression.

Controversial Questions: Is it possible to coherently argue that (a)-(d) (and/or (a)-(d), (f), and (g)) are indeed terrorist attacks, but that the rest of these events are not? That is, can one define 'terrorism' in a coherent, well-motivated way so that many of the actions of al Qaeda and similar groups are correctly defined as terrorism, but the U.S. and its allies have never (yet) committed acts of terrorism? (Notice how the philosopher's insistence on consistency can cut against a view based on pure politics or pure nationalism.)

VI. Is Terrorism Ever Morally Permissible?

Khatchadourian's Theses: (1) Terrorism is never morally permissible; (2) Terrorism is shown to be morally impermissible by its violating three general principles of *jus in bello*: (a) necessity, (b) discrimination, (c) proportionality; (3) Many acts of terrorism also violate the just cause condition of *jus ad bellum*.

Necessity: To be just, an act of violence in war must be necessary to achieve some just end or goal—there can't be a non-violent (or significantly less violent) means to that end.

Discrimination: To be just, an act of violence in war cannot be conducted with the intention of harming innocent non-combatants.

Proportionality: To be just, an act of violence in war cannot cause so much harm, destruction and suffering that its negative aspects and effects outweigh or swamp the value of the good or just cause for which the act was committed.

The Doctrine of Double Effect: Thomas Aquinas introduced the doctrine of double effect to account for morally permissible acts of self-defense. Surely violence in self-defense is sometimes morally justified; but it isn't the case that just anything goes here. In particular the three conditions listed above must be met. If you're justified in harming someone else to a certain degree when defending yourself (which is a just cause or good reason to fight): (a) you can't have a non-violent or less damaging way of repelling the attack available to you; (b) your intention must be to defend yourself: you mustn't intend the harm done to your assailant (the harm done to your assailant mustn't be anything more than an expected consequence of your fulfilling your intention to defend yourself); and (c) the harm done to your assailant must not be much greater

than the harm that would be caused to you by the attack were it successful. There is also a further condition that Timmons describes:

Intrinsic permissibility: The action [here violence in self-defense] must be morally permissible when considered apart from its effects.

Questions: How plausible is it that one does not intend to kill one's assailant when one does so because one judges it to be necessary for the preservation of one's life? Do acts of violence ever satisfy the "intrinsic permissibility" condition? Are any acts *intrinsically* permissible (or, for that matter, intrinsically impermissible) or does the moral status of an act instead always depend on the value or disvalue of the consequences of its performance?

At any rate, one might argue *that terrorism is always impermissible because it always violates the conditions set forth by the doctrine of double effect*. (This is very close, if not identical to Khatchadourian's thesis.)

An Initial Question: Is this correct? Are violations of the doctrine of double effect in a conventional war correctly thought of as *acts of terrorism committed by states* (rather than terrorist organizations)?

Further Questions: Given Sterba's definition of 'terrorism' it's clear that all acts of terrorism violate the discrimination condition. Do all acts of terrorism violate at least one of the other three theses that together constitute the doctrine of double effect? Or are there necessary, proportional, intrinsically permissible attacks against innocent non-combatants for which there is a just cause or goal? *If there are acts of this kind, are any of them justified, or does violation of the discrimination condition itself entail that the act cannot be morally permissible?* In other words, is the "mere" fact that acts of terrorism target non-combatants what makes terrorism always and everywhere immoral?

VII. Torture

This last issue is closely related to the question Shue considers when he is trying to figure out exactly *why* it is wrong to intentionally target non-combatants. After all, we might consider a case in which someone fighting for a just cause knows that fewer people overall will die or suffer if she targets innocents rather than soldiers. Is it morally permissible to intentionally harm the innocent members of the bin Laden family if this would force al Qaeda to disarm? Sterba's definition would classify this as an act of terrorism; would it be a morally justified act of terrorism?

Shue's initial theses: Intentionally targeting innocent non-combatants is considered *prima facie* immoral because it is thought of as *unfair*, and this is the same reason why we consider *torture* unjust: it is a cruel assault upon the defenseless.

First question: How should we define or understand 'torture'? Surely, electrocuting, maiming, or burning someone for information constitutes torture. But what about water-boarding, sleep-deprivation, sexual assault, slaps, punches, or kicks? What about the kind of dental anguish that Dershowitz describes, which is depicted in the movie *Marathon Man*? What about forcing people to violate their religious beliefs (e.g. forcing Muslim men to eat pork or touch the genitals of other men)?

Why, according to Shue, is torture thought to be less fair than harming or killing a soldier in the course of combat? Perhaps it is because the soldier on the battlefield has an opportunity to defend himself. He is not helpless. It's fair that you killed him given his intention to kill you. But this isn't normally the case when someone is being tortured. The victim of torture is defenseless. (Question: If you kill a soldier with a missile you launch from a navy destroyer anchored miles away, does the soldier have a chance to defend himself?)

If this is right, then torture should be less objectionable when the tortured person can do something that will stop the torture. Shue calls these *conditions of compliance*. These conditions are not in place when people are tortured to send a message to others. Thus, torture for intimidation is never fair, and, therefore, never morally permissible; it is what Shue calls *terroristic torture*.

But what if the torturer's aim is information and she will stop the torture if she believes she has received all of the information for which she is looking? This gives the tortured person a way to stop the torture, and so seems to establish a condition of compliance.

Shue raises two arguments against the claim that conditions of compliance really exist in these cases: (1) Very few if any acts of torture actually meet this condition. (2) Compliance is only possible for "ready collaborators." If the person is actually uninvolved in the scheme concerning which information is sought, she cannot provide the necessary information; but she will nevertheless find it hard if not impossible to show this, and will be unjustly tortured as a result. If the person is a dedicated enemy, revealing the information will be a horrible kind of self-betrayal (and betrayal of his comrades), and this sort of betrayal cannot be considered a legitimate means of escaping the torture.

Question: Is this right? Or is it reasonable to expect someone to betray his or her ideals and comrades when those ideals and comrades are morally pernicious enough to provide a good reason to torture him or her?

Still, let us suppose that torture is never fair. Might it nevertheless be morally justified in a particular case when it is necessary to avoid some great evil? For instance, it probably isn't fair to steal someone's car. But if you have to do this to stop a murder from happening you're morally justified in doing it. (Though there are then particular obligations to the person whose car was unfairly stolen; the obligation not to steal is pro tanto not merely prima facie.) Might torture sometimes be an unfair but morally justified way to prevent or mitigate great harm?

Shue's second thesis: There may be cases in which torture (though unfair to the victim) is morally justified because it is necessary to prevent or mitigate great harm and suffering, but we should not make torture *legal* because doing so would lead to much more harm than could be prevented in the few cases in which torture is really morally permissible because necessary to prevent great evil. Once terrorism were allowed by law, institutional "momentum" would make it "standard operating procedure" which would inevitably lead to extraordinarily damaging abuses.

But what should a government official do if torture is illegal, and she has as good evidence as can be had that she can only prevent great harm and suffering by torturing the person with the relevant information? One example of this would be **the ticking bomb case** that Dershowitz discusses. Shue says that a government official will be morally justified in breaking the law in a ticking bomb case and that this can be thought of along the lines of morally justified acts of "civil disobedience." If the scenario faced by the official were really of the sort we describe when we

discuss the (purely hypothetical) ticking bomb case, a judge could and would suspend the sentence of the convicted official.

Shue's second thesis is not entirely unproblematic as it means making illegal acts we think are morally permissible, even morally desirable. On point here is Dershowitz's description of the "triangular conflict" we are caught in when we consider the morally appropriate legal attitude toward torture:

"One or more of [our] values must inevitably be compromised in making the tragic choice presented by the ticking bomb case. If we do not torture, we compromise the safety and security of our citizens. If we tolerate torture, but keep it off the books and below the radar screen, we compromise principles of democratic accountability. If we create a legal structure for limiting and controlling torture, we compromise our principled opposition to torture in all circumstances and create a potentially dangerous and expandable situation" (p. 438).

This assumes, of course, that torture is an effective means of extracting information in ticking bomb cases, and this is far from obvious. But if we grant that it is, this three-way conflict is extremely hard to resolve. And, as Dershowitz argues, if torture is illegal, officials wary of being prosecuted for it may not torture terrorists even when they are firmly convinced that this is the only way to prevent horrible attacks.

Question: How do we best resolve the conflict in values that Dershowitz describes?